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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 GERARDO FLORES, et al.,

4 Plaintiffs,

5 v.

13 CV 8592 (SN)

6 EASTERN FARMS, INC., et al.,

7 Defendants.

8 -----x

New York, N.Y.
June 16, 2015
2:15 p.m.

9
10 Before:

11 HON. SARAH NETBURN,

12 Magistrate Judge

13 APPEARANCES

14 CILENTI & COOPER

15 Attorneys for Plaintiffs

16 BY: GIUSTINO CILENTI

17 LEE & TAPALAGA, LLP

18 Attorney for Defendants

19 BY: JOHN HYUK LEE
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1 THE DEPUTY CLERK: In the matter of Flores, et al.
2 versus Eastern Farms, Inc., et al., Docket No. 13 CV 8592.

3 Counsel, please state your names for the record.

4 MR. CILENTI: Good afternoon. Giustino Cilenti, of
5 Cilenti & Cooper, for plaintiffs.

6 THE COURT: Good afternoon.

7 MR. LEE: For the defendants, John Lee. Good
8 afternoon, your Honor.

9 THE COURT: Good afternoon.

10 Thank you, all, for coming in. My crew of summer
11 interns is a little disappointed that our trial was resolved,
12 but we're here to hear a little bit about the settlement that
13 the parties have agreed to. I have some of the broad-picture
14 outlines that you described for me on the telephone call last
15 week, but, Mr. Cilenti, why don't you tell me in more detail
16 what's being contemplated and why you think this is a fair
17 resolution for your clients.

18 MR. CILENTI: Judge, the terms of the settlement are
19 as follows:

20 The defendants agreed to pay the plaintiffs a total of
21 \$425,000, \$75,000 of which will be paid on or before July 15th,
22 2015. Thereafter, starting on September 1st, 2015, the
23 defendants agreed to make 28 payments, consecutive and equal,
24 consecutive monthly payments and equal payments, in the amount
25 of \$12,000 each; and the 30th and final payment will be for a

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1 total sum of \$14,000.

2 THE COURT: When do you contemplate the settlement
3 being completed?

4 MR. CILENTI: Today -- well --

5 THE COURT: Sorry, the payment.

6 MR. CILENTI: The payment? There's 30 total payments,
7 so it's about two and a half years.

8 THE COURT: Okay. You don't have a date, though?

9 MR. CILENTI: No, I don't.

10 THE COURT: Okay.

11 MR. CILENTI: I'm thinking the end of two thousand --

12 THE COURT: Well, two and a half years is going to get
13 us to probably March of 2018, I think.

14 MR. CILENTI: Right, somewhere around there; February
15 maybe.

16 THE COURT: Okay.

17 MR. CILENTI: The defendants are going to pay the
18 monthly installments by regular check. In the event that any
19 of the checks are returned to us by the bank due to
20 insufficient funds, the defendants agree to pay a penalty of
21 \$200 for each such check.

22 We will provide written notice to defendants' attorney
23 if any of the checks are returned to us due to insufficient
24 funds. The defendants will then have ten days to provide us
25 with a replacement check but the replacement check has to be by

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1 certified funds.

2 There is a penalty for a default, whether that's a
3 default due to the defendants' entire lack of payment,
4 installment payment, or due to insufficient funds. There is a
5 penalty. We will again provide written notification to
6 defendants' counsel, both by fax and email. They will have ten
7 days to cure the default and provide us with a check or a
8 certified check due to insufficient funds.

9 To the extent that the defendants fail to cure the
10 default within the ten-day period, the entire amount
11 outstanding at the time of the default immediately becomes due
12 and owing as of the 11th day, together with a penalty of
13 \$85,000, as well as reasonable attorneys' fees and costs
14 incurred by the plaintiffs to enforce the terms of the
15 settlement.

16 THE COURT: Sorry, the penalty was 85,000?

17 MR. CILENTI: Yes.

18 THE COURT: Plus attorneys' fees for the effort to
19 make good on the payment?

20 MR. CILENTI: Correct.

21 As part of that, the plaintiffs can apply to the court
22 to have immediate judgment entered against the defendants, on
23 notice, of course, to defense counsel.

24 If the defendants allege a breach of the settlement in
25 any way by any of the plaintiffs, the defendants agree to

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1 continue to make the monthly installment payments, so long as
2 it's payable to the defendants' attorneys and held in escrow
3 while the issue of any alleged breach by any of the plaintiffs
4 is being determined.

5 The defendants can seek a hearing with the Court as to
6 any alleged breach by the plaintiffs.

7 THE COURT: What sort of terms are the plaintiffs
8 being held to, that they might breach?

9 MR. CILENTI: Well, there really isn't any, to be
10 honest with you. I just do this as a precaution. In most
11 cases -- sometimes there are settlement agreements that contain
12 confidentiality provisions. In this particular one, we are not
13 going to agree to a confidentiality provision. So I don't
14 really know what there could be that the plaintiffs could
15 breach, but to the extent that there are any issues that the
16 defendants raise for any reason whatsoever, we want to ensure
17 that the installment payments are being made when they're
18 supposed to be made, and held by defendants' counsel in escrow.
19 This way, once whatever issue is raised, is resolved, and if
20 it's resolved in favor of the plaintiffs, that whatever is
21 being held in defense counsel's escrow account, it gets paid
22 out immediately.

23 THE COURT: There's no nondisparagement, for instance?

24 MR. CILENTI: Neither side requested it from the
25 other. So, no, there is no nondisparagement clause.

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1 THE COURT: So remind me, is it 17 or 18 plaintiffs?

2 MR. CILENTI: Eighteen.

3 THE COURT: Of the 18 plaintiffs, do any of them still
4 work for the defendant?

5 MR. CILENTI: I believe two.

6 THE COURT: And there's no provision that prohibits
7 that those who no longer work there to reapply?

8 MR. CILENTI: Defendants did not request that, but I'm
9 pretty sure that none of the plaintiffs are going to reapply.

10 THE COURT: Okay. I'm just trying to come up with
11 what could possibly be a breach.

12 MR. CILENTI: If there is a breach alleged by the
13 defendants for any reason, they would of course have to
14 establish it as a matter of law. The prevailing party in any
15 such hearing or proceeding has the right to have their
16 reasonable attorneys' fees and costs paid as a result of having
17 to come and defend or to prosecute such a proceeding.

18 I think, Judge --

19 THE COURT: I have a few other questions, unless
20 there's something you want to tell me first.

21 MR. CILENTI: No, I'm just trying to make sure that I
22 have all of the terms.

23 I don't know that I made clear, Judge, that the
24 installment payments would be made on the 1st of each month,
25 starting on September 1st, after the initial payment, which is

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1 July 15th.

2 THE COURT: Okay.

3 Tell me a little bit about how the plaintiffs are
4 being compensated. Specifically, what I am wondering is, how
5 did you determine what amount each individual plaintiff is
6 entitled to? How does that number stand up to the amount that
7 you were seeking at trial? And is there any prioritizing as to
8 how each plaintiff is being paid, or is each getting a little
9 bit at every installment so everybody is sort of in it for the
10 long haul together, or are certain plaintiffs being paid before
11 others?

12 MR. CILENTI: Everyone's in it for the long haul.
13 They're each going to get 30 payments. And the way --

14 THE COURT: And your firm will distribute those
15 checks, you'll get one check from defendants and you'll deposit
16 it and distribute?

17 MR. CILENTI: Correct.

18 THE COURT: Okay.

19 MR. CILENTI: And the way it's determined, as far as
20 how much each plaintiff will get, as the Court is aware, in
21 anticipation of trial, we calculated each plaintiff's alleged
22 damages. And what we'll do is, what we normally do is, we come
23 up with a total amount of unpaid wages that we believe is owed
24 to the whole group and then we break down what each plaintiff's
25 percentage share of that total amount is.

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1 So, in other words, just by way of example, if we had
2 \$100,000 in unpaid wages and we had ten plaintiffs, I don't
3 know that it would be an equal share of 10 percent each, but
4 depending on the amount of hours that they worked and the
5 amount of pay that they received, each person's pay or unpaid
6 wages would be calculated by a percentage share. And that's
7 the same way that -- once our fee is carved out of the
8 settlement amount, the remaining amount that's left would be
9 distributed to each plaintiff based on their percentage share
10 of their unpaid wages.

11 THE COURT: Are you also in it for the long haul?

12 MR. CILENTI: I am, I am.

13 THE COURT: I want to ask you about your fees
14 separately but let's just continue with your clients. I know
15 you provided for purposes of trial what you believed to be
16 their wages owed.

17 How does the 425-less-fees number stack up against the
18 amount that you were seeking at trial?

19 MR. CILENTI: Including liquidated or not?

20 THE COURT: It's all the same, so if you want to
21 compare it just wages or if you want to compare it to the
22 total.

23 MR. CILENTI: I think the wages came out to slightly
24 above 700,000, and with liquidated damages, it was slightly
25 over a million.

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1 We can get into the fairness part of that now or we
2 can wait on --

3 THE COURT: Sure.

4 MR. CILENTI: We understand, it's plaintiffs'
5 position, that we're leaving money on the table. There's no
6 question in our mind about that. I think defense counsel
7 probably has a different view of that, but we believe that
8 we're leaving money on the table. However, I think that's true
9 of any settlement; there's going to be money left on the table.

10 In these FLSA cases, I think the courts are aware, and
11 the parties are aware, that there is a range of reasonableness
12 that gets applied to each such case and really there's no
13 golden rule as to what that range is. It's kind of a
14 case-specific analysis.

15 In this particular case, we do feel that we are
16 leaving about 50 percent of the money on the table. However,
17 we have done our due diligence on the defendants. The
18 defendants have always maintained a financial hardship and an
19 inability to pay a substantial amount more than what they're
20 settling for today.

21 We're confident that we have done our research on the
22 defendants, we have done our asset research on the defendants,
23 and while we think we could have obtained a larger judgment had
24 this gone to trial, based on the information that we received,
25 the likelihood of us being able to collect 100 percent of that

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1 judgment was probably small to none.

2 We know that the defendants had filed bankruptcy once
3 before. We know that they have another pending Department of
4 Labor investigation for years prior to the years at issue in
5 this case, for a separate set of employees, so they're being
6 kind of hit on both ends in that respect, for probably the
7 better part of 12 years, going back from today. We know that
8 they had a landlord issue where they were in arrears with their
9 landlord and were in discussions with the landlord about
10 renewing their lease, there was some possibility that they were
11 going to lose their lease. I don't know if that was ever
12 rectified or not, but we know that that was an issue
13 previously.

14 So we think that, based on the information that we
15 have, there's -- there's a balancing act here, we know that,
16 and we are more concerned about the fact of, yes, we'll have a
17 large judgment but we won't be able to collect on it. I think
18 settling today gives our clients some finality. It's an amount
19 that's more than de minimis, for sure, and it's also an amount
20 that the defendants had represented to us that they can sustain
21 without having to go file a second bankruptcy filing or without
22 defaulting. So we're hopeful that that is the case and that we
23 won't have to come back here again advising the Court that
24 there's been some sort of default along the way.

25 But I think, like I said, Judge, it provides some

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1 finality to the plaintiffs, it provides them with some
2 guaranteed money, a substantial amount of money for each
3 plaintiff, and I think it's a number that they can live with,
4 and the defendants have told us that they can live with.

5 THE COURT: What is your fee arrangement here?

6 MR. CILENTI: Our fee arrangement is one-third.

7 THE COURT: One-third?

8 And do you know what your lodestar is?

9 MR. CILENTI: It's close. I can't say for sure it's a
10 hundred cents right there, but it's pretty close because of the
11 amount of time that we spent with the records and also, of
12 course, preparing all the way up to what we thought was going
13 to be a trial.

14 THE COURT: Okay.

15 Mr. Lee, anything you want to add?

16 MR. LEE: Yes, your Honor.

17 Just to confirm Mr. Cilenti's account of the terms,
18 everything is accurate except for the fact that there was
19 discussion, I did provide Mr. Cilenti with a release language
20 that specifically states that the plaintiffs will give up all
21 claims that they may have had in the past until the present
22 day, which included the ability to reapply as well as any
23 backpay, overtime liquidated damages, attorneys' fees regarding
24 any labor claims. And the default by the plaintiff will be a
25 scenario where they will disregard their obligation under the

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1 release and conduct the very same -- or institute or commence a
2 claim that will subject the defendants to defend unnecessarily.

3 THE COURT: So this is a general release that would
4 include antidiscrimination statutes and things like that?

5 MR. LEE: Yes, your Honor.

6 THE COURT: And, Mr. Cilenti, you've advised your
7 clients of that?

8 MR. CILENTI: Yes, Judge.

9 THE COURT: Okay. And they all understand what that
10 means?

11 MR. CILENTI: Yes.

12 MR. LEE: Yes, your Honor. So I guess the default
13 language that applies to the plaintiffs would be that scenario.
14 And I don't anticipate any other scenario besides that.

15 THE COURT: Thank you. That clarifies it.

16 And with respect to your clients' ability to pay,
17 you're satisfied, based on your discussions with your client,
18 that they will make good on the settlement agreement and follow
19 this protocol?

20 MR. LEE: Yes, your Honor. And as the Court is aware
21 from the last time I was before your Honor, their offer was
22 250,000. And I have had very long discussions with my client
23 on their ability and what they're capable of to successfully
24 settle this case and make payments, and I had many long
25 discussions with Mr. Cilenti to make sure that this is really

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1 about exactly as Mr. Cilenti said, not really disputing about
2 the merits of the case but it's about what my client could pay
3 to bring this case to a settlement. And we did provide
4 Mr. Cilenti with information as well as the reasoning why we
5 could offer what we could offer. And we came to this
6 settlement after numerous discussions, and we feel that both
7 parties are agreeable to the number before the Court.

8 THE COURT: Okay.

9 Is it contemplated that the settlement agreement is
10 going to be submitted to me for me to so-order or is that
11 unnecessary?

12 MR. CILENTI: Judge, it was my intention that the
13 record would serve as essentially --

14 THE COURT: That's fine. I just want to make sure.

15 MR. CILENTI: Yes.

16 THE COURT: Okay.

17 Well, thank you, all. I've had a lot of experience
18 with this case, including before you got involved, Mr. Lee,
19 with prior counsel, and I know we have worked hard. I think we
20 had at least two settlement conferences and maybe even a third
21 when Mr. Lee got involved, but we've been working hard to
22 settle this case. I am satisfied that both sides have
23 excellent counsel and that we have probably hit the sweet spot
24 as far as a dollar amount that reflects an appropriate
25 resolution of the plaintiffs' claims, given their allegations

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1 and the risks inherent with trial, and an amount that the
2 defendants can pay consistent with the terms of the agreement.

3 I know that the defendant has been suffering or at
4 least have represented to me -- and I have met with the
5 principals at settlement conferences -- that they have had
6 financial difficulty. I didn't know about this second DOL
7 investigation but that sort of even raises the specter even
8 more, about the ability to pay if the plaintiffs were awarded a
9 substantial judgment beyond the amount that the parties have
10 settled for today. So I am satisfied that this settlement
11 agreement is a fair and is a reasonable resolution for these
12 claims.

13 I'm satisfied that the plaintiffs understand their
14 obligations, including, as now clarified to me, the general
15 release that they're each going to be asked to sign, which will
16 extinguish any possible claims that they have, even claims that
17 are totally unrelated to their wage-and-hour claim.

18 And I am satisfied in the manner in which the funds
19 are being distributed, which is to say: The plaintiffs are
20 getting their pro rata share based on their reasonable estimate
21 of what they are owed; that everybody is getting payment over
22 time, so nobody is being prioritized over anybody else,
23 including counsel; that everybody is going to be working
24 together.

25 This is a minor issue but just for clarity, in what I

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1 hope is the unlikely event that there is a bounced check and
2 the \$200 fee is paid to the plaintiffs, is that money for
3 counsel, whatever fee is accrued?

4 MR. CILENTI: We intend to distribute it, both with
5 fees and to the plaintiffs.

6 THE COURT: Okay. So it will be just like any other
7 settlement compensation?

8 MR. CILENTI: Correct.

9 THE COURT: And I understand that the settlement
10 agreement is going to provide for my continued jurisdiction in
11 the case until final payment and that the parties will reach
12 out to me if there are any issues, and I will jump on the case
13 again.

14 So with that, I'm going to approve the settlement
15 agreement.

16 I want to thank everybody. I know you worked really
17 hard, particularly towards the very end of this process. I
18 have two large boxes in my office, which we will send to
19 storage. And I will issue an order today that closes the case
20 out and finds the agreement to be fair and reasonable.

21 MR. CILENTI: Thank you, Judge.

22 MR. LEE: Thank you, your Honor.

23 THE COURT: Thank you very much, everybody.

24 MR. LEE: Thank you.

25 (Adjourned)